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IN THE

Supreme Court of the United States

OCTOBER TERM 1940

No. 344

MARGARET CONWAY, *Petitioner*,

v.

GEORGE H. O'BRIEN, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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STATEMENT OF THE CASE

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit requesting that a judgment of that court reversing a judgment rendered for the petitioner by the United States District Court for the District of Vermont and ordering that the petitioner's complaint be dismissed, be reviewed and finally determined by this Court.

Petitioner's "Summary Statement of the Matter Involved" is somewhat more argumentative than is consistent with good practice, and contains much that might more properly have been reserved for inclusion in such brief as she will file if her Petition is granted. For the purposes of this petition however, it may be taken as fairly setting forth the questions presented by this Petition.

Petitioner relies only upon two alleged errors as a basis for her petition to this Court. The first is, in substance, that the Circuit Court of Appeals erred in reversing the judgment of the District Court for its error in denying respondent's (defendant-appellant below) motion at the close of all of the evidence for a directed verdict. The other ground is that the Circuit Court of Appeals erroneously ordered that the complaint be dismissed and final judgment rendered for Respondent, instead of merely reversing the judgment and directing that a new trial be had.

Respondent will be prepared, if the occasion arises, to demonstrate that in neither of the respects relied upon by Petitioner was the Circuit Court of Appeals in error. He will confine himself in this brief, however, to showing that Petitioner has failed to set forth sufficient grounds to warrant the granting of the relief requested.

SUMMARY OF ARGUMENT

I. The alleged error of the Circuit Court of Appeals in holding that the District Court erred in failing to direct a verdict for Respondent is insufficient to warrant granting Petitioner's petition.

The decision of the Circuit Court of Appeals in this case is not in conflict with the decision of another Circuit Court of Appeals upon the same subject matter, is not in conflict with applicable local decisions and is not so radical a departure from the usual course of judicial proceedings as to warrant an exercise of this Court's power of Supervision.

Petitioner seeks only an extended review of the evidence and of the inferences to be derived therefrom.

II. The alleged error of the Circuit Court of Appeals in reversing the judgment of the District Court and rendering final judgment for the Respondent is insufficient to warrant the granting of Petitioner's petition.

Petitioner has failed to show that the decision of the Circuit Court of Appeals is in conflict with the decisions of this or any other Court of the United States or is so radical a departure from the usual course of judicial proceedings as to warrant an exercise by this Court of its power of supervision.

ARGUMENT

I. The alleged error of the Circuit Court of Appeals in holding that the District Court erred in failing to direct a verdict for Respondent is insufficient to warrant granting this Petition.

When it is reduced to its simplest elements, Petitioner's first ground of complaint appears to be that the Circuit Court of Appeals grossly erred in failing to accept as true the statement of the witness Wilson that he, Wilson, was traveling at a speed of only two miles per hour (R. pp. 114, 182) and in accepting as true the statement of the respondent, O'Brien, that he was traveling at only fifteen miles per hour as he approached the point where the collision occurred (R. pp. 140, 141, 182). The obvious and sensible answer to the first contention was given by the Circuit Court of Appeals in its opinion when it stated that the speed at which the Wilson car was traveling was immaterial to the main issue in the case, i.e., whether there was sufficient evidence that Respondent O'Brien was guilty of gross negligence to warrant submission of the case to the jury. Thus it is apparent that any error by the Circuit Court of Appeals in this respect was entirely harmless.

With reference to any challenged error on the part of the Circuit Court of Appeals in failing to view in the light most favorable to the petitioner (Plaintiff-Appellee below) the evidence with respect to the speed of the car of Respondent (Defendant-Appellant below) it is respectfully urged that

any inferences to be derived from the evidence that the collision broke a guard rail and the testimony of the petitioner that an "awful crash" resulted from the collision (R. pp. 67, 102, 104, fols. 201, 305, 311, 312) would be so largely matters of speculation and conjecture as to be insufficient as a basis for disregarding the uncontradicted testimony of the Respondent. There was no error in accepting Respondent's testimony that he was traveling at only fifteen miles per hour as he approached the point of collision.

No question is made by the petitioner in her brief but that the Circuit Court of Appeals, in its effort to "set a quantitative standard for the measurement of incommensurable factors" (R. p. 182) in anywise violated or deviated from the established rules concerning and definitions of "gross negligence" as expounded in *Shaw, Adm'r v. Moore*, 104 *Vt.* 529, 162 *Atl.* 373, 86 *A. L. R.* 1139 and in the other Vermont decisions set forth in the opinion (R. pp. 182, 183, fols. 183-184). Petitioner has not pointed out, and Respondent has been unable to find, any decisions by this Court, or by the Circuit Courts of Appeals of the Second or any other circuits with which the decision in this case would be in conflict, upon the legal questions involved.

As has frequently been stated by the Supreme Court of Vermont, and as was recognized by the Circuit Court of Appeals, there is no hard and fast rule whereby it can be determined with precision whether or not a given course of conduct constitutes "gross negligence" (R. p. 183, fol. 184). Each case must be decided upon its own facts.

> *Rich v. Hall*, 107 *Vt.* 455, 459, 181 *Atl.* 113
> *Powers v. Lackey*, 109 *Vt.* 505, 506, 1 *Atl.* (2*d*) 693
> *Hall v. Royce*, 109 *Vt.* 99, 104, 192 *Atl.* 193.

Respondent submits that in seeking a writ of certiorari in this case, Petitioner does not intend to present to this Court for review a decision which is in conflict with the holdings of any other court or which departs so far from the accepted and usual course of judicial proceedings as to require the exercise of this court's power of supervision. On the contrary, she desires only to have this Court make an extended review of the evidence and the inferences to be derived

therefrom and to determine whether she introduced sufficient evidence before the District Court to justify a submission of the question of the respondent's gross negligence to the jury.

It has been repeatedly held by this court that a writ of certiorari will not be granted to accomplish such a purpose.

Forsyth v. Hammond, 166 *U. S.* 506, 41 *L. ed.* 1095, 1098

Houston Oil Co. of Texas v. Goodrich, et al., 245 *U. S.* 440, 441, 62 *L. ed.* 385

Southern Power Co. v. North Carolina Public Service Com., 263 *U. S.* 508, 62 *L. ed.* 413

United States v. Johnston, 268 *U. S.* 220, 227, 69 *L. ed.* 925, 926

General Talking Pictures Corp. v. Western Electric Corp., 304 *U. S.* 175, 178, 82 *L. ed.* 1273, 1275.

II. The alleged error of the Circuit Court of Appeals in reversing the judgment of the District Court and rendering final judgment for the respondent is insufficient to warrant granting to Petitioner the relief requested.

As set forth by Petitioner in her summary statement of the matter involved, and in her brief, at the close of all of the evidence Respondent moved that a verdict be directed in his favor on the ground that the evidence, viewed in the light most favorable to the plaintiff; did not warrant a finding by the jury that the defendant was guilty of gross negligence (R. p. 156, fols. 467, 468). The motion was denied and Respondent was allowed an exception. No motion for a judgment notwithstanding the verdict or for a new trial was made by the respondent at any time after the rendition of the verdict.

With respect to Petitioner's statement on page 7 of her Petition that Respondent's brief before the Circuit Court of Appeals contained only the request that the judgment of the lower court "be reversed," Respondent is willing to concede that such was the fact. Petitioner will doubtless reciprocate by conceding, if the point is in any way material, that Respondent briefed and argued three exceptions to

various errors on the part of the District Court in addition to his exception to the denial of his motion for a directed verdict. Had any or all of these other exceptions been sustained, the Respondent would only have been entitled to a new trial.

The Circuit Court of Appeals considered only Respondent's exception to the denial of his motion for a directed verdict and found error in denying it. Holding directly that it was unnecessary for Respondent to have filed a new motion after verdict or judgment, the Circuit Court of Appeals decided that it had authority, under Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States, to dismiss the complaint. Judgment was reversed and the complaint dismissed (R. p. 184, fol. 185).

Petitioner claims that the foregoing interpretation of Rule 50(b) and the decision rendered in conformity therewith is in conflict with the decisions of this Court, with the decisions of other Circuit Courts of Appeals and with the established practice on the part of the Bar of the various United States District Courts.

Respondent has studied carefully the majority and dissenting opinions in *Slocum v. New York Life Ins. Co.*, 228 *U. S.* 364, 57 *L. ed.* 879 and the opinion in *Baltimore & Carolina Line, Inc. v. Redman*, 295 *U. S.* 654, 79 *L. ed.* 1636, cited by Petitioner in support of her contention that the decision here under consideration violates established rules of this Court. Respondent submits that the decision in this case in no way conflicts with either the decision or language of either case. On the contrary, no mention can be found in the opinion of this Court in the *Redman Case, supra*, or in the opinion of the Circuit Court of Appeals for the Second Circuit, reported in 70 *Fed.* (2*d*) 635 of any motion having been filed after the motion for a directed verdict. It appears from both opinions that a motion for a directed verdict was filed by the defendant, the case was submitted to the jury under a reservation by the trial judge of his decision on the motion and a verdict rendered for the plaintiff; the trial judge then denied defendant's motion and rendered judgment for the plaintiff. The defendant appealed. It was there held that the appellate court could render final judg-

ment in favor of the defendant. Such procedure, can hardly be considered as inconsistent with the holding in this case.

The case of *Aetna Ins. Co. v. Kennedy*, 301 *U. S.* 389, 81 *L. ed.* 1177, reported below in 87 *Fed.* (2*d*) 683 deals with a question of practice under the laws of Pennsylvania quite unlike the practice established by the new Rules of Civil Procedure. It cannot, in Respondent's opinion, be considered as establishing an interpretation of Rule 50(b) in conflict with the present decision.

The decisions by various Circuit Courts of Appeals cited by Petitioner are equally ineffective to demonstrate any conflict in the decisions of the Courts of the United States which could be eliminated by a decision by this Court upon the point which Petitioner seeks to raise. In all of the cases cited on Pages 26, 27 and 28 of her brief, with the exception of *Lowden v. Denton*, 110 *Fed.* (2*d*) 274, the party whose motion for a directed verdict was denied, filed a motion within the 10 day period prescribed by Rule 50(b) for a judgment notwithstanding the verdict. In each instance the procedure was approved, but there is nothing in any of the opinions to indicate that any court believed that the filing of a motion after verdict or judgment was a condition precedent to the consideration by the appellate court of the questions raised by the motion for a directed verdict or to the rendition by the appellate court of a final judgment in favor of the moving party in the event that error in the denial of the motion was found.

In *Lowden v. Denton, supra*, from which Petitioner quotes on page 27 of her brief, the opinion does not indicate what motions were filed by the defendants referred to. The meticulous compliance with the terms of Rule 50(b), quoted from the opinion, might, for all that appears, have been applied to procedure similar to that followed by the Respondent in this case. See also *Demers v. Railway Express Agency, Inc.* (*CCA*-1), 108 *Fed.* (2*d*) 107.

With respect to the practice of the Bar of the various United States Courts, under Rule 50(b), Respondent submits that the short time during which the new Rules of Civil Procedure have been in effect makes it highly improbable that any widespread practice has grown up which would

be seriously disturbed by the decision of the Circuit Court of Appeals in this case.

In short, although it is possible that this second matter raised by Petitioner as a basis for the granting of a writ of certiorari is an interesting one, Respondent submits that the narrowness of the question when coupled with the apparent lack of conflict in the decisions on it makes it wholly unnecessary that this Court exercise its extraordinary and discretionary power of review.

CONCLUSION

It is respectfully submitted, therefore, that the alleged errors of the Circuit Court of Appeals for the Second Circuit are not such as to call for review and determination by this Honorable Court.

Respectfully submitted,

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